Supreme Court, U.S.
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No. 93-1047

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER BRANTON, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a listener who lodges a complaint with the Federal Communications Commission alleging that a broadcaster violated the indecency prohibition in 18 U.S.C. 1464 has standing to seek judicial review of the agency's determination that the broadcaster did not violate that statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	13
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

ACLU v. *FCC*, 523 F.2d 1344 (9th Cir. 1975)	12, 13
Allen v. *Wright*, 468 U.S. 737 (1984)	9
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	8, 9
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973)	6
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	7
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978)	2
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	5
FRC v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933)	5
Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979)	6, 7
Hale v. *FCC*, 425 F.2d 556 (D.C. Cir. 1970)	4
Illinois Citizens Committee for Broadcasting v. *FCC*, 515 F.2d 397 (D.C. Cir. 1974)	11, 12
Infinity Broadcasting Corp., 3 F.C.C. Rcd. 930 (1987), aff'd in part *sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988)	2
Linda R. S. v. *Richard D.*, 410 U.S. 614 (1973)	9
Llerandi v. *FCC*, 863 F.2d 79 (D.C. Cir. 1988)	4, 7
Lujan v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992)	8
Maier v. *FCC*, 735 F.2d 220 (7th Cir. 1984)	4, 7, 8, 12

Cases—Continued: Page

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 5
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 8
Office of Communication of United Church of Christ v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) 4, 7
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) . 5
Rizzo v. *Goode*, 423 U.S. 362 (1976) 8
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4 (1942) .. 5, 6
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) 9
Syracuse Peace Council v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) 7
Wisniewski v. *United States*, 353 U.S. 901 (1957) 11

Constitution and statutes:

U.S. Const.:
Art. III 6
Amend. I 12
Act of June 19, 1934, ch. 652, § 402(b)(2), 48 Stat. 1093 6
Communications Act of 1934, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 307(a) 5
47 U.S.C. 312(a)(6) 2, 10, 11
47 U.S.C. 402(a) 6
47 U.S.C. 402(b) 6
47 U.S.C. 402(b)(1)-(4) 6
47 U.S.C. 402(b)(6) 6
47 U.S.C. 503(b)(1)(d) 2
47 U.S.C. 503(b)(2) 2
47 U.S.C. 503(b)(5) 11
Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* 7
Hobbs Act, 28 U.S.C. 2344 6
18 U.S.C. 1464 ..... 2, 10, 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 993 F.2d 906. The ruling of the Federal Communications Commission (Pet. App. 15a-21a) is reported at 6 F.C.C. Rcd. 610.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1993. Pet. App. 12a. The order of the court of appeals denying rehearing was entered on September 30, 1993. Pet. App. 14a. The petition for a writ of certiorari was filed on December 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has prohibited the broadcast of obscene or indecent language over the public airwaves under 18 U.S.C. 1464. The Federal Communications Commission (FCC) has express statutory authority to impose various sanctions for the violation of Section 1464, including license revocation (47 U.S.C. 312(a)(6)) and forfeiture penalties (47 U.S.C. 503(b)(1)(D) and (2)). See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 735-738 (1978). In exercising its authority to enforce Section 1464, the FCC has defined "indecency" as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 930 (1987), aff'd in part *sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The Commission has also explained that the context of a broadcast is essential to an indecency determination, and that material broadcast in "the context of a *bona fide* news program" would likely be of less concern than other types of programming. 3 F.C.C. Rcd. at 937 n.31.

On February 8, 1989, petitioner heard a news report concerning alleged organized crime leader John Gotti on the National Public Radio (NPR) news program, "All Things Considered." The report included an excerpt of a wiretapped telephone conversation that had been introduced at Gotti's trial. During the parts of the conversation aired on NPR, Gotti "used variations of 'the f—- word' ten times." Pet. App. 2a. Prior to the broadcast, NPR advised listeners that "the following story contains some very rough language." *Id.* at 17a. It did not, however, delete or mask the expletives, and petitioner

filed a complaint concerning that broadcast with the Mass Media Bureau of the FCC. *Id.* at 2a-3a.

The Mass Media Bureau dismissed petitioner's complaint, ruling that NPR's broadcast was not indecent and provided no basis for Commission action under Section 1464. Pet. App. 3a. Petitioner sent a letter to the Commission asking how he could appeal that decision. Treating his letter as an application for review, the Commission affirmed the Bureau's decision in a letter ruling. *Id.* at 15a-19a. Over one Commissioner's dissent, the FCC concluded that the program at issue was not indecent because the expletives were broadcast in the context of a *bona fide* news story relating to organized crime. *Id.* at 16a. The Commission emphasized that NPR's use of the expletives "in a legitimate news report" was not "gratuitous, pandering, titillating or otherwise 'patently offensive,' as that term is used in our indecency definition." *Ibid.* The Commission noted that the material prompting petitioner's complaint "was evidence used in a widely reported trial," and that the FCC "traditionally ha[s] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners." *Ibid.*

2. Petitioner sought judicial review of the Commission's ruling. The court of appeals dismissed the petition for review *sua sponte* on the ground that petitioner lacked standing. Pet. App. 1a-11a. The court reasoned that petitioner was seeking to impose sanctions on NPR as a means of influencing the conduct of broadcasters prospectively, and that he lacked standing because "[i]t is mere conjecture that a radio station will again broadcast, at a time when * * * petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute)." *Id.* at 5a-6a.

The court also found it "conjectural whether the FCC's proceeding against the alleged broadcast indecency of February [8], 1989 would cause any radio station(s) in * * * petitioner's area to broadcast any fewer indecent programs in the future." *Id.* at 9a. In the court's view, "radio stations might well decide that the benefits of broadcasting indecent language of the sort petitioner here challenges outweigh the costs of making certain payments to the Government (here in the form of fines rather than of taxes)." *Ibid.*

3. Two intervenors petitioned for rehearing, and the court of appeals ordered the parties to respond. In its response to the petition, the government argued that the court should grant rehearing en banc and reconsider the panel's ruling that petitioner lacked standing. On September 30, 1993, the panel denied the petition for rehearing, and the en banc court denied the suggestion for rehearing en banc, with three judges dissenting. Pet. App. 13a, 14a.

ARGUMENT

1. It is well settled that viewers and listeners have standing in various circumstances to sue the FCC to challenge broadcasters' noncompliance with requirements of the Communications Act of 1934 and the FCC's implementing regulations. See, *e.g.*, *Llerandi* v. *FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988); *Maier* v. *FCC*, 735 F.2d 220, 227-230 (7th Cir. 1984); *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1000-1006 (D.C. Cir. 1966) (Burger, J.); *Hale* v. *FCC*, 425 F.2d 556, 558 n.2 (D.C. Cir. 1970) (per curiam).

That recognition of viewer and listener standing arises from the special circumstances surrounding broadcast regulation. As this Court has explained, "the radio spectrum simply is not large enough to accommo-

date everybody," and "[r]egulation of radio was therefore as vital to its development as traffic control was to the development of the automobile." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 213 (1943). For that reason, Congress charged the FCC with "allocat[ing] frequencies among competing applicants in a manner responsive to the public 'convenience, interest, or necessity.'" *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 377 (1969); see 47 U.S.C. 307(a) (directing FCC to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"); see also, *e.g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). And the central purpose of broadcast licensing is to "protect the public" (*Sanders Bros.*, 309 U.S. at 475), whose rights as viewers and listeners have been deemed "paramount" in the scheme of broadcast regulation. *Red Lion*, 395 U.S. at 390.[1]

This Court has recognized that in enacting the Communications Act of 1934, Congress applied those principles in making judicial remedies broadly available to members of the public for whose benefit Congress enacted the statute. In *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942), the Court emphasized that "[t]he purpose of the Act was to protect the public interest in communications," and that to that end, Congress gave persons "aggrieved or whose interests are adversely affected" by Commission action the right to appeal such

[1] To ensure that broadcast licenses are operated in the public interest, Congress has refused to recognize any property interest in such licenses. Instead, licenses have a limited duration, and they "may be revoked, and need not be renewed." *Sanders Bros.*, 309 U.S. at 475. Thus, the channels "presently occupied remain free for a new assignment to another licensee in the interest of the listening public." *Ibid.*

action. *Id.* at 14 (quoting Act of June 19, 1934, ch. 652, § 402(b)(2), 48 Stat. 1093).[2] The Court also made clear that Congress gave "these private litigants * * * standing only as representatives of the public interest." *Scripps-Howard Radio*, 316 U.S. at 14; see also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 136-137 (1973) (Stewart, J., concurring) ("the public interest in broadcasting has been recognized as a rationale for liberalized standing on the part of listener groups in Commission licensing proceedings").[3]

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[2] Congress authorized judicial review in the D.C. Circuit by any person "who is aggrieved or whose interests are adversely affected" by the grant or denial of applications for broadcast licenses or permits, for the renewal or modification of such instruments, or for their transfer, assignment, or other disposition. 47 U.S.C. 402(b)(6); see also 47 U.S.C. 402(b)(1)-(4). In 47 U.S.C. 402(a)—the provision under which review was sought in this case—Congress authorized judicial review of any Commission order through the Hobbs Act, 28 U.S.C. 2344, which allows "[a]ny party aggrieved by [a] final order" to file a petition for review in "the court of appeals wherein venue lies." Although the petition for review in this case was filed under Section 402(a), rather than Section 402(b), that distinction does not affect the availability of the judicial remedy afforded by Congress. Sections 402(a) and 402(b) "route appeals to different courts," but "the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform." *Scripps-Howard Radio*, 316 U.S. at 15; see *id.* at 16 ("As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee.").

[3] That liberalized standing is consistent with Article III. In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), this Court, in light of a broad congressional conferral of standing (*id.* at

Based on those considerations, the D.C. Circuit in *Office of Communication of United Church of Christ* v. *FCC* (*UCC*), *supra*, found that viewers had standing to challenge the renewal of a license on the ground that the licensee "provided a disproportionate amount of commercials and entertainment and did not give a fair and balanced presentation of controversial issues." 359 F.2d at 998.[4] The court emphasized that "a broadcast license is a public trust subject to termination for breach of duty," and that Congress assigned the public an important role in seeing that licensees exercise their publicly conferred authority consistently with the requirements of the Act. *Id.* at 1003. That principle has been applied in a number of contexts by the D.C. Circuit and other courts of appeals. See, *e.g.*, *Llerandi*, 863 F.2d at 85 (listener has standing to challenge assignment of two AM licenses in overlapping service area to one owner, in violation of FCC rules); *Maier* v. *FCC*, 735 F.2d at 227-230 (listener

96-97), held that individuals could bring suit against a realtor engaged in racially discriminatory practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, even though the individuals were "testers" who did not actually wish to purchase homes. Because the testers were residents of the neighborhood in which the alleged unlawful practices occurred, the Court found that they had been injured as homeowners in the community. 441 U.S. at 111-115. By the same token, those who live in a licensee's community and listen to the licensee's programming may be injured by its noncompliance with the FCC's programming requirements.

[4] The FCC's "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflect[ed] the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). The Commission has subsequently eliminated that doctrine. See *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

has standing to challenge violation of fairness doctrine and personal attack rule); see also *id.* at 223 (citing cases in which courts of appeals found listener or viewer standing without discussion).

2. Although the court of appeals in this case held that petitioner, a listener of NPR, lacked standing to challenge the Commission's dismissal of his indecency complaint, the court's narrowly based ruling does not merit this Court's review. The court of appeals did not question either petitioner's standing to seek relief from the Commission or the continuing availability of viewer or listener standing to seek judicial review under established precedent in the court's own circuit. (In fact, the court acknowledged the vitality of, and explicitly sought to distinguish, its prior decision in *UCC*, *supra*. Pet. App. 6a-7a.) Instead, the court merely held that on the facts of this case, petitioner did not have standing to contest the FCC's dismissal of his complaint because it was unclear whether the particular and isolated injury he alleged would again be visited upon him. *Id.* at 5a-7a.[5] The

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[5] The court of appeals rested (Pet. App. 4a-7a) its decision on this Court's decisions holding that to establish standing, a plaintiff must allege an immediate and concrete injury and may not seek prospective relief when it is speculative whether the injury complained of will ever be repeated. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). For example, in *City of Los Angeles* v. *Lyons*, upon which the court of appeals principally relied (Pet. App. 4a-5a), this Court held that an individual who was placed in an allegedly unlawful chokehold during a traffic stop lacked standing to enjoin police from using such chokeholds in the future. 461 U.S. at 105-110. The Court explained that Lyons' past injury, "while presumably affording [him] standing to claim damages * * *, does nothing to establish a real and immediate threat that he would again be stopped * * * by an officer or officers who

court of appeals also held that it was unclear whether the alleged injury would be redressed by the sanctions that the Commission, in its discretion, might impose if there were a favorable disposition of the complaint.[6]

The court of appeals made those determinations without briefing or argument, and the government contested the court's standing determination in its response to the intervenors' petition for rehearing. See Gov't C.A. Resp. 2-7. We continue to believe that the court of appeals' analysis was flawed; indeed, we note that even NPR does not agree with all aspects of the court's analysis. See NPR *et al.* Br. in Opp. 9 n.9. Nevertheless, we believe that this case does not present an appropriate vehicle for this Court to consider the D.C. Circuit's approach to listener standing.

Because the record below does not indicate whether and to what extent petitioner was a repeat listener of

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would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at 105.

[6] The court of appeals cited (Pet. App. 7a-9a) this Court's precedents holding that individuals lacked standing to contest the decisions of executive officials not to impose costs or penalties on third parties. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (*EKWRO*). For example, in *Linda R. S.*, the Court found it speculative that the plaintiff's requested relief—the prosecution of someone alleged to be delinquent in child support payments—would result in the payment of support. 410 U.S. at 618; see also *EKWRO*, 426 U.S. at 42-43 (finding it speculative that denial of a tax exemption to hospitals providing insufficient free medical care would increase the availability of such care); *Allen* v. *Wright*, 468 U.S. at 758-759 (finding it speculative that withdrawal of tax exemption to racially discriminatory private schools would change schools' exclusionary policies). In those cases, the Court found that the requested relief would not redress the injury alleged.

stations carrying NPR, it does not provide a well developed factual setting for evaluating the court of appeals' application of this Court's injury-in-fact cases to the context of viewer and listener standing. Moreover, because petitioner's complaint did not specify what sanctions he sought from the FCC,[7] the record in this case does not present a firm basis for evaluating the redressability of his alleged injury. Indeed, it is far from clear that the D.C. Circuit would reject a complaint such as petitioner's seeking certain forms of relief. For example, among the remedies that the FCC may prescribe for a violation of 18 U.S.C. 1464 is license revocation. See 47 U.S.C. 312(a)(6). Like nonrenewal, license revocation is an "inherently future oriented" (Pet. App. 7a) remedy that examines whether the particular licensee should be exercising the public trust conferred by the license. Under the court of appeals' reasoning (*ibid.*), it would appear that a complaint requesting license revocation would be cognizable under the court's reading of *UCC*. Because of the imprecise nature of the relief requested by petitioner's complaint (and because the court of appeals only considered potential fines), it is difficult to evaluate the scope of the D.C. Circuit's ruling and its implications for future Section 1464 cases.[8] We therefore

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[7] Petitioner's May 18, 1989, complaint to the Mass Media Bureau merely stated that "NPR SHOULD BE REQUIRED TO MAINTAIN A POSITION OF CONTROL IN PROTECTING THEIR PROGRAMS FROM POSSIBLY INDECENT AND OBSCENE MATERIAL." App., *infra*, 2a.

[8] Indeed, in his November 17, 1989, letter seeking review of the Mass Media Bureau's decision to dismiss his complaint, petitioner emphasized that "MY COMPLAINT IS NOT AGAINST RADIO STATION WSMC-FM, COLLEGEDALE, TN BUT IS AGAINST NATIONAL PUBLIC RADIO THE ORIGINATOR OF THE PROGRAM IN QUESTION." App., *infra*, 3a. Because Section

believe that the ruling below requires further development by the lower courts before this Court's review is warranted.

3. Finally, contrary to petitioner's argument (Pet. 10-12), there is no conflict among the circuits warranting this Court's review. Petitioner argues that the decision below conflicts with the D.C. Circuit's decisions in *UCC* and its progeny. As discussed, however, the court of appeals expressly distinguished *UCC* on the ground that the appellant there had alleged a "pattern" of licensee misconduct in the context of a license renewal proceeding, which is "inherently future oriented." Pet. App. 6a, 7a. In contrast, the record in this case does not clearly disclose either the extent of petitioner's potential exposure to the alleged injury or the precise remedy sought. In any case, petitioner's allegation of an intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[9]

312(a)(6) provides for revocation of "any station license," it appears that petitioner would not have been able to seek license revocation under his complaint. It is unclear whether the court of appeals' ruling would have been different if petitioner had proceeded against the station, rather than the program originator. This case therefore presents no occasion for determining whether a complainant would have standing in a proceeding against a broadcast station, which would face license renewal and revocation proceedings.

In addition, before the FCC may impose forfeiture liability (*i.e.*, a fine) on a person who does not have a "license, permit, certificate, or other authorization" issued by the FCC, the Commission must give that person a warning. 47 U.S.C. 503(b)(5). Thus, it is unclear whether the FCC would have the discretion to impose a fine on NPR in this case.

[9] Petitioner also relies (Pet. 12) on *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1974). There,

Nor is the decision below inconsistent with the Seventh Circuit's decision in *Maier* v. *FCC*, *supra*. There, the court held that the mayor of Milwaukee had standing to challenge the Commission's decision that a broadcaster had not violated the fairness doctrine and the personal attack rule. In contrast with this case, the complainant in *Maier* sought to remedy the alleged retrospective violation of his statutory rights by seeking specific and affirmative relief of "at least one-half hour free air time of his own choosing on each of WTMJ's broadcast outlets." 735 F.2d at 223. Nothing in the D.C. Circuit's opinion suggests that it would find that standing did not exist in similar circumstances.

The Ninth Circuit's decision in *ACLU* v. *FCC*, 523 F.2d 1344 (1975), also presents no conflict with the decision in this case. In *ACLU*, the court recognized viewer and listener standing in conformity with the D.C. Circuit's decision in *UCC*. See *ACLU*, 523 F.2d at 1347. The ACLU was challenging aspects of the Commission's cable regulations,[10] arguing that they did not fulfill the

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the court of appeals allowed members of the listening public to intervene to challenge the FCC's decision to impose fines on a radio station for violating Section 1464. The radio station did not itself appeal, and the court found that listeners had standing on the basis that "the Commission must pay careful attention to ensure that the freedom of substantial numbers of the listening public is not curtailed because of possible offensiveness to particularly sensitive listeners." 515 F.2d at 406. Whatever the merits of petitioner's standing in this case, he possesses no First Amendment interest similar to the one supporting standing in *Illinois Citizens Committee for Broadcasting*. In any case, any tension between that decision and the decision below is for the D.C. Circuit to resolve.

[10] Specifically, the ACLU challenged the Commission's failure to impose common carrier obligations on cable access channels and to limit cablecasting by cable operators. 523 F.2d at 1346.

asserted requirement of the Communications Act to maximize sources of programming. At the outset, the court in *ACLU* held that "[i]f ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant." *Id.* at 1348. Significantly, the court went on to find the ACLU's claim unmeritorious. *Id.* at 1350-1351. In any event, the ACLU there sought an affirmative remedy requiring the FCC to fulfill its alleged obligation to ensure the availability of a diverse array of programming; that case did not involve a complaint by someone seeking to avoid exposure to certain programming.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM E. KENNARD
General Counsel
Federal Communications Commission

APRIL 1994

APPENDIX A

PETER BRANTON
1007 SCENIC HIGHWAY
LOOKOUT MTN, TN 37350

18 MAY '89

FEDERAL COMMUNICATIONS COMMISSION
MASS MEDIA BUREAU
ENFORCEMENT DIVISION
COMPLAINTS AND INVESTIGATION BRANCH
1919 M STREET
WASHINGTON, DC 20554

DEAR SIRS,

THIS IS IN FURTHER REFERENCE TO MY LETTER OF 10 FEB 1989 TO UNITED STATES SENATOR ALBERT GORE, JR AND MR ALEX D. FELKER'S REPLY TO SENATOR GORE.

MY COMPLAINT IS REGARDING A NATIONAL PUBLIC RADIO BROADCAST OF 8 FEB 1989 AND CARRIED IN THIS AREA BY RADIO STATION WSMC, COLLEGDALE [*SIC*], TN. A PART OF THE PROGRAM "ALL THINGS CONSIDERED" CONTAINS A TRANSCRIPT OF A TELEPHONE CONVERSATION BY A PERSON IDENTIFIED AS "MR JOHN GOTTI", AND A TAPE OF THIS PORTION IS ENCLOSED.

MR FELKER'S LETTER OUTLINES A "THREE-PRONG TEST" FOR OBSCENE MATERIAL AND I FEEL THAT IT REQUIRES VERY LITTLE IMAGINATION TO SEE THAT THIS BROADCAST WILL

PASS ALL SEGMENTS OF THE TEST WITH FLYING COLORS. FURTHERMORE, THE ENCLOSED TAPE OF THIS BROADCAST CONTAINS THE PRELIMARY [*SIC*] ADMISSION THAT THE LANGUAGE IS "EXTREMELY PROFANE" AND CERTAINLY THE LANGUAGE IS SUCH AS DESCRIBED BY MR FELKER AS "INDECENCY" PER THE DEFINATION [*SIC*] OF THE COMMISSION.

PERSONS FROM RADIO STATION WSMC HAVE ADVISED ME THAT A "DAX" WARNING FROM NPR WAS ISSUED CONCERNING THIS PROGRAM, BUT WAS INADVERTENTLY IGNORED, MUCH TO THE EMBARRASSMENT OF THE STATION. THIS INCIDENT EMPHASES [*SIC*] THAT A WARNING OF THIS TYPE IS NOT SUFFICIENT PROTECTION AND RAISES THE PRIMARY QUESTION OF THE ADVISABILITY AND NECESSITY OF ORIGINATING A BROADCAST CONTAINING SUCH INDECENT AND OBSCENE MATERIAL.

I FEEL THAT I AM NOT ALONE IN MY DEEP CONCERN REGARDING THE DETERIORATION OF MORAL STANDARDS IN OUR GREAT COUNTRY AND I FEEL THAT NPR SHOULD BE REQUIRED TO MAINTAIN A POSITION OF CONTROL IN PROTECTING THEIR PROGRAMS FROM POSSIBLY INDECENT AND OBSCENE MATERIAL.

YOURS TRULY,

/s/ Peter Branton
PETER BRANTON

CC: SENATOR ALBERT GORE, JR
MR ALEX D. FELKER
RADIO STATION WSMC
NATIONAL PUBLIC RADIO

APPENDIX B

PETER BRANTON
1007 SCENIC HIGHWAY
LOOKOUT MTN., TN 37350

17 NOV '89

MS EDYTHE WISE, CHIEF
COMPLAINTS & INVESTIGATIONS BRANCH
ENFORCEMENT DIVISION
MASS MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DEAR MS WISE,

THANK YOU FOR YOUR LETTER OF OCT 26, 1989 (COPY ATTACHED).

FIRST I WOULD LIKE TO MAKE IT CLEAR THAT MY COMPLAINT IS NOT AGAINST RADIO STATION WSMC-FM, COLLEGEDALE, TN BUT IS AGAINST NATIONAL PUBLIC RADIO THE ORIGINATOR OF THE PROGRAM IN QUESTION.

SECOND, I FIND IT DIFFICULT TO UNDERSTAND HOW YOU COULD POSSIBLY FEEL THAT THE LANGUAGE IN THIS BROADCAST OF 8 FEB 1989 TO BE LESS THAN IN VIOLATION OF ANY STANDARDS OF "OBSCENE OR INDECENT MATERIAL". IF, IN FACT, THIS IS DEEMED TO BE ACCEPTABLE, I FIND IT HARD TO IMAGINE WHAT WORDS OF OUR LANGUAGE COULD BE CONSIDERED "ACTIONABLY INDECENT". IF IT MAKES ANY DIFFERENCE, I REMIND YOU THAT

THE BROADCAST CONTAINED A PRELIMARY [*SIC*] ADMISSION THAT THE LANGUAGE IS "EXTREMELY PROFANE" AND I FURTHER NOTE THAT THE WORD THAT WAS REPEATED NUMEROUS TIMES IN THE BROADCAST IS IDENTIFIED AS "OBSCENE" IN THE AMERICAN HERITAGE DICTIONARY", PUBLISHED BY HOUGHTON MIFFLIN CO, BOSTON. I ALSO REFER YOU TO THE ATTACHED LETTER OF 4 APRIL, 1989 TO SENATOR ALBERT GORE FROM ALEX D. FELKER, CHIEF, MASS MEDIA BUREAU, IN WHICH MR FELKER STATES, "HOWEVER, WE CAN, AND WILL, TAKE ACTION AGAINST THE BROADCAST OF OBSCENE OR INDECENT MATERIAL".

IF YOUR DECISION, AS STATED IN YOUR LETTER OF 26 OCT, REMAINS UNCHANGED, PLEASE ADVISE IF IT [*SIC*] IS ANY PROCEDURE OF APPEAL THAT I MAY FOLLOW. YOUR REPLY WILL BE APPRECIATED.

YOUR VERY TRULY,
/s/ Peter Branton
PETER BRANTON

CC MR ALEX D. FELKER
SENATOR ALBERT GORE, JR